No. 91-380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

J. GERARD HOGAN, *et al.*,
Petitioners,

v.

MARK E. MUSOLF, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

PETITIONERS' REPLY BRIEF

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REPLY TO STATEMENT OF THE CASE

The trial court did not refuse to rule upon the respondents' qualified immunity defense. The order of the proceedings was agreed to by the parties. TR. 13.[1] The respondents' motion on this issue was pending at the time their petition for an interlocutory appeal was granted. TR. 17.

The respondents' conduct with respect to the rights of the members of the class to obtain relief has been in issue from the outset of this case. TR. 13. The trial court found that judicial intervention was compelled in order to protect these important constitutional interests. *See*

[1] "TR" refers to the record on appeal before the Wisconsin Courts.

Pet. App. C at 41a. The trial court's injunction was carefully tailored to insure that all rights of the class were protected from abridgement during the pendency of this case. *See* Pet. App. C at 42a.

I. THE CONFLICT IS WIDENING

A. States

Avoiding the importance of the federal questions presented, respondents urge a denial of the petition on the basis that there is no state conflict. However, a casual examination of the commentators establishes both the importance of the questions presented by this petition and the conflict among the states' highest courts. *See, e.g.*, Note, *Clarifying Comity: State Court Jurisdiction and Section 1983 State Tax Challenges*, 103 Harv. L. Rev. 1888 (1990); Yuengert, *Does the Tax Injunction Act of 1937 Affect State Court Jurisdiction Over State Tax Challenges Under Section 1983 of the Civil Rights Act of 1871?*, 45 Washington and Lee L. Rev. 381 (1988); Taylor, *Section 1983 in State Court: A Remedy for Unconstitutional State Taxation*, 95 Yale L.J. 414 (1985).

The decisional law of Mississippi illustrates this conflict. In *State Tax Commission v. Fondren*, 387 So. 2d 712 (Miss. 1980), *cert. denied, sub nom. Redd v. Lambert*, 450 U.S. 1040 (1981), the Mississippi Supreme Court refused to entertain a challenge to a state tax brought under 42 U.S.C. § 1983, reasoning that because of the Tax Injunction Act's bar on federal court jurisdiction, taxpayers were required to exhaust state remedies. *Id.* at 723. The basis of the holding in *Fondren* is indistinguishable from the holding in *Hogan*. However, after this Court's decision in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), the Mississippi Supreme Court overruled *Fondren*, expressly holding that *Fondren* confused a federal court jurisdictional limitation "with the enforceability of a federally created right and

remedy in state court." *Burrell v. Mississippi State Tax Comm'n*, 536 So. 2d 848, 864 (Miss. 1988).[2]

B. *Hafer v. Melo*

Respondents reassert the argument adopted by the Court below that they are immune under the Eleventh Amendment from "individual" liability for acts committed in the course of their "official" capacity. *See* Respondents' Brief at 10. In *Hafer v. Melo*, 60 U.S.L.W. 4001 (1991), this Court rejected this argument. It held that this distinction urged "finds no support in the broad language of § 1983." *Id.* at 4003. It also held that this "distinction cannot be reconciled with our decisions regarding immunity of government officers otherwise personally liable for acts done in the course of their official duties." *Id.* The court also rejected the Eleventh Amendment argument advanced here, noting that " 'it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law.' " *Id.* at 4004. (citation omitted).[3] Thus, un-

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[2] *See also* the *Davis*-related case of *Barker v. State of Kansas*, No. 91-611, *cert. granted* (November 27, 1991), where the trial court rejected the assertion of an exhaustion requirement similar to that imposed by Wisconsin.

[3] Respondents imply that review is unnecessary since they will ultimately succeed on the damages claim under the defense of qualified immunity. Petitioners note that this defense has not yet been considered by the trial court and is not now before the Court in this Petition. Petitioners also note, however, that it is unlikely that the respondents will prevail on this defense because it is not available to them in the first instance.

As this Court has held "[s]ection 1983 immunities are 'predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.' " *Tower v. Glover*, 467 U.S. 914, 920 (1984) (citations omitted). In 1871, tax officials enjoyed no such immunity. *See, e.g., Osborn v. Bank of the United States*, 22 U.S. 738 (1824); *Erskine v. Van Arsdale*, 82 U.S. 75 (1872); *Atchison & C. Ry. Co. v. O'Connor*, 223

der *Hafer*, the respondents may be held individually liable under section 1983 for acts performed in the course of their official duties. The *Hogan* decision cannot be reconciled with *Hafer*. Petitioners contend that this significant conflict, *alone*, warrants review and reversal of *Hogan* by this Court.

II. DECLARATORY RELIEF

Respondents also contend that the petitioners are not entitled to declaratory and injunctive relief because the discriminatory scheme has been prospectively cured for taxes on pensions paid in years 1989 and after.[4] However, under Wis. Stat. § 990.04, the discriminatory scheme remains in effect for ongoing enforcement of the scheme for federal pensions paid in years before 1989. App. A at 1a. The decisions of this Court are contrary to the respondents' contention. See, *e.g.*, *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890, 896 (1989) ("Texas cannot strip appellant of standing by changing the law after taking its money."); *Quern v. Mandley*, 436 U.S. 725, 733 n.7 (1978) (class action suit challenging state's administration of federal emergency assistance program not mooted by state's withdrawal from program). Moreover, this Court's decision in *Dennis v. Higgins*, —— U.S. ——, 111 S. Ct. 865, 870 (1991), makes clear that petitioners "may sue and obtain injunctive and declaratory relief" under section 1983.

U.S. 280 (1912). Alternatively, qualified immunity is only properly asserted by officials exercising discretionary functions. *Westfall v. Erwin*, 484 U.S. 292 (1988). The respondents have represented to the trial court that they have acted without discretion. TR 25. Consequently, the respondents cannot establish that they are entitled to assert the defense. *Tower*, 467 U.S. at 920-21; *Westfall*, 484 U.S. at 291 n.4.

[4] The record establishes that in excess of 5% of the class has not returned the tax for tax year 1988. TR 13. Petitioners represent that Respondent Bugher continues to enforce the scheme.

III. THERE IS NO IMPLIED REPEAL OF § 1983

In the decision below, the Wisconsin Supreme Court legislated a result which is plainly at odds with the express will of Congress and the prior pronouncements of this Court. Ignoring the important federal questions presented and the significant role of stare decisis in our system of jurisprudence, the respondents summarily reassert here that review should be denied on the basis of their policy views.[5]

The Court below concluded that a taxpayer's right to the independent remedy of section 1983 had been *impliedly* repealed by the Tax Injunction Act, 28 U.S.C. § 1341. In so ruling, it ignored the rulings of this Court which disfavor implied repeals and which require clear evidence of congressional intent to do so. *See e.g., Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). *Cf. Johnson v. Robison*, 415 U.S. 361, 373 (1974) (clear and convincing evidence of congressional intent is required before a statute will be construed to restrict access to judicial review). *See also* Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 NYU L. Rev. 1, 27 (1985).

In carving out an exception to section 1983, premised on the Tax Injunction Act, the Court below also ignored that "the purpose of a statute includes not only what it sets out to change, *but also what it resolves to leave alone*." *West Virginia University Hospitals, Inc. v. Casey*, 111 S. Ct. 1138, 1147 (1991) (emphasis added). The Tax Injunction Act is a neutral limitation upon the

[5] The policy considerations of interference asserted here by the respondents and adopted by the court below are illusory. Respondents' real complaint is not about section 1983, but rather the breadth of the underlying constitutional rights sought to be vindicated in this case. *See* Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 NYU L. Rev. 1, 22 (1985).

jurisdiction of federal courts. It does not in any way limit the federally created right and remedy of section 1983 in state court.

Contrary to the conclusion of the Wisconsin Supreme Court, the Tax Injunction Act was specifically intended to cure the abuse of out-of-state corporations invoking the equity powers of the federal courts to interfere in state tax disputes "[a]nd all the time in this dispute there is no Federal question involved."[6] 81 Cong. Rec. 1417 (1937). *See also* S. Rep. 1035, 75th Cong., 1st Sess. 2 (1937); H.R. Rep. No. 1503, 75th Cong., 1st Sess. 2-3 (1937). Senator Bone, the legislation's sponsor, "emphasized . . . that the bill does not take away any equitable right of a taxpayer, or deprive him of a day in court." 81 Cong. Rec. 1416.

The Act's legislative history explicitly recognized that one of the existing rights of taxpayers was the exception permitting the enjoining of state and county taxes where the "tax law is invalid." H.R. Rep. No. 1503 at 2.[7] Given the unequivocal intent of Congress "*not to take away any equitable right*," it is simply inconceivable that Congress

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[6] Respondents' contentions regarding the Tax Injunction Act are also premised upon an underlying assumption which is contrary to historical fact. At the time the Tax Injunction Act was passed, section 1983 claims such as those at issue in this case had to be brought in state court. At that time, federal courts only had jurisdiction over taxpayer section 1983 claims which satisfied, *inter alia*, the amount-in-controversy requirement. *See* H.R. Rep. No. 1503, 75th Cong., 1st Sess. 4. Accordingly, in enacting the Tax Injunction Act, Congress did nothing to alter or change the obligation of state courts to entertain taxpayer section 1983 claims similar to those in issue here since such claims were not cognizable in the federal courts in the first instance.

[7] Wisconsin law is in accord with the law left unchanged by the Tax Injunction Act. Indeed, the very case cited by the respondents contradicts their policy assertion by recognizing that Wisconsin courts "may entertain actions to enjoin state officers . . . from acting beyond their constitutional . . . powers." *Metzger v. Department of Taxation*, 35 Wis. 2d 119, 132-33, 150 N.W.2d 431 (1967).

intended to extinguish the obligations of state courts to enforce the rights expressly conferred by section 1983 or established by this Court's decisions. *See, e.g., Ex parte Young*, 209 U.S. 123 (1908); *Atchison & C. Ry. Co. v. O'Connor*, 223 U.S. 280 (1912). *Cf. Mitchum v. Foster*, 407 U.S. 225 (1972) (section 1983 is an Act of Congress that falls within the expressly authorized exception to the federal anti-injunction statute of 28 U.S.C. § 2283).[8] Indeed, if Congress intended to permit the states to impose exhaustion requirements upon section 1983, its subsequent conclusion that it was carving out a narrow exception to the non-exhaustion rule when it enacted 42 U.S.C. § 1997e was superfluous. However, it was not the province of Wisconsin to "alter the balance struck by Congress in establishing the procedural framework for bringing actions under § 1983." *Patsy v. Board of Regents*, 457 U.S. 496, 512 (1982).[9]

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[8] There is nothing inconsistent with the enforcement of constitutional rights under section 1983 and a state's own remedial scheme. *Cf. Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975) ("We are disinclined, in the face of congressional emphasis upon the existence and independence of the two remedies, to infer any positive preference for one over the other without a more definite expression in the legislation Congress has enacted . . . ."). This is particularly so when preferring the state scheme over section 1983 is likely to result in the subsequent assertion that the section 1983 remedy is time barred. *Id.* at 466.

[9] Respondents' reliance on their inverted analysis of the Tax Injunction Act is also misplaced. It assumes that the requisites of the Act are satisfied. The respondents have made clear that they will provide no relief unless ordered by a court to do so. TR. 5. A process, which requires that 26,000 elderly citizens separately establish that which the trial court has already found (and that which the respondents have not appealed), is suspect at best. *See Garrett v. Bamford*, 538 F.2d 63, 71 (3d Cir.), *cert. denied*, 429 U.S. 977 (1976) ("Where legal remedies require multiple suits involving identical issues against the same defendant, federal equity practice has recognized the inadequacy of the remedy and has provided a forum."). In addition, forcing these elderly citizens to exhaust an administrative process which has no subject matter jurisdiction to

In *Felder v. Casey*, 487 U.S. 131 (1988), this Court resolved that Congress has preempted state law exhaustion requirements for actions brought under section 1983. As noted by Justice Blackmun, "[o]ne of the sounder canons of judicial restraint is that once a court has spoken conclusively on a question of statutory interpretation, it should reconsider the question only when faced with compelling evidence that its initial answer was incorrect." *Individual Rights*, 60 NYU L. Rev. at 27.[10] It was error for the court below to presume to overrule *Felder* in substantial part.

CONCLUSION

For the reasons set forth in the Petition, Supplemental Brief, and this Reply, petitioners respectfully request that their petition be granted and that the decision below be reversed.

Respectfully submitted,

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provide the relief sought under section 1983 is equally inadequate. *Direct Marketing Ass'n, Inc. v. Bennett*, 916 F.2d 1451, 1457 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1683 (1991) ("Certainty that a remedy exists is an important factor in establishing that a state court remedy is 'plain.'") (citation omitted). *See also* Hull, *Uncertainty of State Remedy May Provide Access to Federal Courts*, 1 Journal of Multistate Taxation 135 (1991).

[10] The pre-*Felder*, state court decision of *Linderkamp v. Bismarck School District No. 1*, 397 N.W.2d 76 (N.D. 1986), relied on by the Court below, certainly is not compelling evidence that this Court's initial answer was incorrect. Moreover, the result reached by the court in *Linderkamp* cannot be reconciled with this Court's decision in *Dennis v. Higgins*, 111 S. Ct. 865 (1991).

APPENDIX

EXCERPTS OF RELEVANT WISCONSIN STATUTES

1989-1990

990.01 Actions pending not defeated by repeal of statute. The repeal of a statute hereafter shall not remit, defeat or impair any civil or criminal liability for offenses committed, penalties or forfeitures incurred or rights of action accrued under such statute before the repeal thereof, whether or not in course of prosecution or action at the time of such repeal; but all such offenses, penalties, forfeitures and rights of action created by or founded on such statute, liability wherefor shall have been incurred before the time of such repeal thereof, shall be preserved and remain in force notwithstanding such repeal, unless specially and expressly remitted, abrogated or done away with by the repealing statute. And criminal prosecutions and actions at law or in equity founded upon such repealed statute, whether instituted before or after the repeal thereof, shall not be defeated or impaired by such repeal but shall, notwithstanding such repeal, proceed to judgment in the same manner and to the like purpose and effect as if the repealed statute continued in full force to the time of final judgment thereon, unless the offenses, penalties, forfeitures or rights of action on which such prosecutions or actions shall be founded shall be specially and expressly remitted, abrogated or done away with by such repealing statute.